IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1059

FRED Y. OYAMA and KAJIRO OYAMA,

Petitioners,

vs.

STATE OF CALIFORNIA.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI BY NATIONAL LAWYERS GUILD, AMICUS CURIAE.

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Introductory Statement.

The National Lawyers Guild, a national association of lawyers, and its Los Angeles Chapter, composed of members of the bar of California, by leave of court present this brief *amicus curiae*, in support of the petition for writ of certiorari in this case. The Guild is interested primarily in the constitutional questions presented and the question of racial discrimination from which such constitutional questions arise. Some of counsel for this *amicus curiae* have appeared for and are representing certain Negro defendants in cases which have been submitted and are now pending before the Supreme Court

of the State of California in actions brought to enforce racial covenants against their occupancy of real property.*

We are concerned, in the instant case, with the fact that the Supreme Court of California premised its judgment affirming escheat of real property belonging to the citizen Fred Y. Oyama, on essentially "racist" grounds, resting in turn upon rulings of this court in several cases.**

The purpose of this brief is to assist in what we conceive is now this court's duty—to re-examine those decisions. We believe that the acceptances underlying them are founded on error, unconsidered assumptions of fact, and on unnoticed errors in reasoning.

It is true that racial antagonisms, rejected blood myths, and the legends clustered about the concept of race cannot furnish a court grounds for decision. The tide of

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*In re Laws, Crim. No. 7698, original *habeas corpus* proceeding before the Supreme Court, to prevent enforcement of contempt judgments for violating civil injunction by continued occupancy of their own home. *Hester, et al. v. Barbe, et al.*, L. A. No. 19589 (consolidated with actions L. A. Nos. 19588, 19590, 19591, 19592, 19593, and 19594: in all of said actions injunctions were granted against appealing Negro defendants, enforcing racial covenants against their occupancy of homes that they had purchased. *Anderson v. Auseth*, L. A. No. 19759, wherein eight civil injunction actions against numerous Negro defendants, premised on racial covenants restricting occupancy of their property, were consolidated for trial, and wherein judgment went for defendants upon the trial court's order excluding evidence, based upon his stated opinion: "This Court is of the opinion that it is time members of the Negro race are accorded without reservations and evasions the full rights guaranteed them under the 14th Amendment to the Federal Constitution. Judges have been avoiding the real issue for too long. Certainly there was no discrimination against the Negro race when it came to calling upon its members to die on the battlefields in defense of this country in the war just ended. * * *."

**See cases cited by the California Supreme Court, R. 113 *et seq.* and language of the Court, R. pp. 117 and 119.

prejudice recedes, and the judicial record which rode that tide remains forever a rejected relic of yesterday's prejudices. We recognize, however, that mere good wishes may prove an insufficient weapon with which to confront a State Constitution, legislative enactments, and decisions of the highest tribunal in the land. Accordingly, we believe that this court is entitled to have, not anthropology, not impassioned persuasion, not a war message, nor even a sermon, but a basis founded on law and reason for a just decision. This brief will seek to offer such a basis.

The California Alien Land Law as Applied Violates the Fourteenth Amendment to the Constitution.

State legislation which discriminates against a class of persons violates the Fourteenth Amendment unless there is a reasonable relationship between the qualities which distinguish the class, the discriminations imposed, and the evil sought to be avoided by the State.

It is of first importance therefore to have clearly in mind these things: the nature of the class, and the nature of the discrimination.

If in fact there is a reasonable relationship between the class, the discrimination, and a justifiable end, the legislation is not subject to attack for violating the Fourteenth Amendment. But if it does not meet that test, constitutional precepts join with natural sentiments in overthrowing it.

In the present case the class includes: "all aliens other than those" (Act 261, Deering's General Laws, Sec. 2) "eligible to citizenship." (*Id.*, Sec. 1.)

The discrimination against members of this class is to deprive them of the right to "acquire, possess, enjoy, use,

cultivate, occupy (or) transfer real property, or any interest therein * * *" or to "have in whole or in part the beneficial use thereof * * *." (*Id.*, Sec. 2.)

We contend that the class created by the statutes has no qualities peculiar to it which bear any logical relationship toward any end which the State may, under the Fourteenth Amendment, seek to accomplish.

ATTRIBUTES OF VALID CLASSIFICATION.

Without burdening the court with the obvious, it is worth while to note the rules which distinguish reasonable, and thus valid, classification from arbitrary classification, which is void.

"Arbitrary" classification is consistently condemned. This classification groups persons together by some distinguishing characteristic which, however, has no reasonable connection with the purpose professed to be served by the discrimination.

> "Such a classification is not based on anything having relation to the purpose for which it is made."
>
> *Smith v. Cahoon*, 283 U. S. 553, 72 L. Ed. 1264, 1274.

In *Martin v. Superior Court*, 194 Cal. 93, 227 Pac. 762, the California Supreme Court well stated the rule:

> "If the law is to bear equally upon all persons, the legislature must classify whenever there exists a reason which may rationally be held to justify a diversity of legislation."
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> * * * * * * * *
>
> "The classification, however, must not be arbitrarily made for the mere purpose of classification, but

must be based upon some distinction, natural, intrinsic, or constitutional, which suggests a reason for and justifies the particular legislation. That is to say, not only must the class itself be germane to the purpose of the law but the *individual components of the class must be characterized by some substantial qualities or attributes which suggest the need for and the propriety of the legislation.*" (Our emphasis.)

This Court follows the same rule. In *Atchison, Topeka & Santa Fe v. Mathews*, 174 U. S. 96, 43 L. Ed. 909, it was said:

> "Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed."

In *Metropolitan Casualty Insurance Company v. Brownell*, 294 U. S. 580, 79 L. Ed. 1070, Justice Stone says:

> "The ultimate test of validity is not whether foreign corporations differ from domestic, but whether the differences between them are pertinent to the subject with respect to which the classification is made." (L. Ed. 1072.)

It must be observed that even in arbitrary classification the distinguishing characteristics exist in fact. It is by them that the members of the class are identified for discrimination. The arbitrary nature of the classification is exposed in the next step in the process—the lack of *facts*, inherently attributable to each member of the class, which could justify the discrimination.

Characteristics of the Discriminated Class.

It is important to observe that the class of "ineligible aliens" is created by legislative fiat, congressional act.

In this respect it is to be distinguished from most frequent bases for classification. Imposition of specific benefits or burdens because of age, sex, or competency, to take the clearest examples, are frequent. In such a case the classification is based on qualities inherent in its members, and the fact, characteristic, or quality on which the classification is based is true of every member of the class.

The State of California may seek to evade the position that the class of ineligible aliens is created by arbitrary congressional act. It may assert that the class is based on physical, psychological, or other characteristics of the group. This it can do only by looking to the bases for the congressional classification. It is of course true that Congress distinguished eligible from ineligible aliens by means of national origins. But discrimination in rights relating to real property based on national origins would plainly render the legislation void. The power of Congress to admit to citizenship is not subject to the constitutional measures which restrict the State's power to discriminate among persons in their rights to real property.

There are no alternatives. The State must adopt one of two positions on this question. Either the class of persons discriminated against, ineligible aliens, is based on the *facts* underlying the naturalization laws, that is, national origins; or the class of discriminated persons is created solely by legislative fiat, that is, ignoring the

national origin of the members of the class and any characteristics, physical or mental, real or pretended, inherent in the particular national group selected by Congress for exclusion from citizenship.

If the State asserts the first position, no further argument is necessary, because such bases for classification would render the act unconstitutional.

Buchanan v. Warley, 245 U. S. 60, 62 L. Ed. 149;

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220;

Korematsu v. U. S., 323 U. S. 239, ... L. Ed. .....;

In re Opinion of the Justices, 207 Mass. 601, 94 N. E. 558, 34 L. R. A., N. S. 604;

Quan Hing Sun v. White, 254 Fed. 402;

Chaires v. Atlanta, 164 Ga. 755, 139 S. E. 559, 55 A. L. R. 230.

Congress may arbitrarily select and exclude for purpose of citizenship.

Fong Yue Ting v. U. S., 149 U. S. 698, 37 L. Ed. 905;

Fok Young Yo v. U. S., 185 U. S. 296, 46 L. Ed. 917;

U. S. v. Wong Kim Ark, 169 U. S. 649, 42 L. Ed. 890, 897.

But California's power to select and exclude for purpose of real property rights must not be arbitrary. Can California increase its powers by the device of adopting

the congressional classification? Can California escape the Fourteenth Amendment by hinging its legislation to this congressional power which is not subject to the amendment? We submit the Constitution is not so insubstantial; the Fourteenth Amendment will not be swung aside so easily.

The class of ineligible aliens includes persons to whom Congress has denied the right of citizenship. It may include persons who do not wish to become citizens, but this is not the distinguishing characteristic of the class. Denial of rights in real property to persons who do not want to become citizens would be founded on fact, not on fiat, and might well be sustained. *But the class of ineligible aliens under this statute is not that class.*

It is certainly a fact within judicial knowledge that among ineligible aliens are many whose dearest wish it would be to become citizens. While the desire to become a citizen is not the distinguishing characteristic of this class, the fact that many do want to be citizens should be borne in mind in considering the class of ineligible aliens. The distinguishing characteristic of ineligible aliens is this: These are the people who, without regard to their loyalties in fact, without regard to their wishes, capacities and longings, these are the people who cannot become citizens.

The Nature of Discrimination.

It is absolute. No language is available to make the exclusion more complete. It is not merely a denial of the right to acquire title by certain means, as is true in some states. Ineligible aliens may not get property, may not hold it, may not occupy it, use it, or transfer it.

The prohibiting language undermines any pretense at reason.

Ownership is the aggregate of all possible uses.

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. . . . Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land (1 Cooley's Bl. Cm. 127)."
>
> *Buchanan v. Warley*, 245 U. S. 60, 62 L. Ed. 149, 161.

No contention is here made that *some* uses allowed to citizens may not be prohibited to aliens. On the other hand, no one would dare to contend that all uses to which land may be put are evil solely because of the person whom such uses benefit. But this is exactly what this statute seeks to accomplish.

If motive were in dispute it would be worth pointing out that no critical analysis of motive could be more revealing than the sweeping prohibitions of this statute. So far as this court's duties are concerned, it is sufficient to note that it is not uses which are aimed at, but persons.

Abuse of land by any person, citizen or alien, can be prevented. This can be accomplished by distinguishing abuse from use, without discriminating against persons. For example, placer mining is an evil in some parts of California because of injury to land. Contour plowing could conceivably be required in hilly country to avoid waste of land by erosion. Pollution of streams is now forbidden. Other good and bad uses properly subject to

control can easily be brought to mind. These are not in question. The State is not aiming at abuses. *Any use whatever* by an "ineligible alien" is forbidden. No reasonable connection between a proper purpose and the means employed can be conjured up.

In *In re Opinion of the Justices,* 207 Mass. 601; 94 N. E. 558, the court distinguished between legislation aimed at abuses and legislation aimed at a class of people. A proposed law would have excluded girls and young women from restaurants and hotels operated by Chinese; on certification from the legislature, the Supreme Court of Massachusetts said that such a law would be unconstitutional. The following is from the opinion:

> "The business of keeping a hotel or restaurant, to which the proposed legislation relates . . . may be conducted legally or illegally, by a person of any nationality. The proposed law, without reference to the way in which it is conducted, puts a restraint upon it which might be expected very seriously to interfere with the successful management of it, whenever it is carried on by a person of any particular nationality, which is not put upon it when it is carried on by a person of any other race and nationality. . . . This proposed legislation does not assume to forbid anything that is necessarily evil in itself, or to deal directly with any offense against order, decency or morality. There are good hotels and bad hotels, good restaurants and bad restaurants, kept by men of the Caucasian race, and there are others of both kinds kept by men of other races. This legislation does not refer to the character or condition of the hotel or restaurant that a young woman may not enter, but refers only to the nationality of the person who conducts it. The enactment of such legislation is not a proper exercise of the police power. It has

no direct relation to the evil to be remedied. It forbids the entry of a young woman into the hotel or restaurant of a Chinese proprietor, even if it is a model of orderly and moral management, and it permits the entry of young women into a hotel or restaurant kept by an American, when it is known to be maintained in part for the promotion of immoral or criminal practices. . . ."

So, in *Buchanan v. Warley, supra,* the same distinction:

"True it is that dominion over property springing from ownership is not absolute and unqualified. The disposition and use of property may be controlled, in the exercise of the police power, in the interest of the public health, convenience, or welfare. Harmful occupations may be controlled and regulated. Legitimate business may also be regulated in the interest of the public. Certain uses of property may be confined to portions of the municipality other than the residence district, such as livery stables, brickyards, and the like, because of the impairment of the health and comfort of the occupants of neighboring property. Many illustrations might be given from the decisions of this court and other courts, of this principle, *but these cases do not touch the one at bar:*

"The concrete question here is: May the occupancy, and necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the states, or by one of its municipalities, solely because of the color of the proposed occupant of the premises? . . ."

The question stated was answered in the negative.

See, also:

State v. Montgomery, 94 Me. 192, 47 Atl. 164.

THE PROFESSED GROUND FOR DISCRIMINATION.

The history of thinking is a record of laboriously tearing down classifications which grew and were accepted thoughtlessly. Classes, synthesized from hypotheses, yield to facts gathered in the field. Armchair assumptions grouping persons or things give way before data. The scholar and the judge no longer have the easy expedient of relying on classifications born in the study, but must face established facts.

This is particularly true in constitutional cases. Where it is claimed that a right guaranteed by the Constitution has been impaired, it is the duty of the court itself to determine the facts, even in cases involving the propriety of a classification.

Weaver v. Palmer, 270 U. S. 702, 70 L. Ed. 654;
Denver Union Stock Yards Co. v. U. S., 57 Fed. 735.

What, precisely, is the danger which the statute seeks to avoid?

In *Mott v. Cline*, 200 Cal. 434, 253 Pac. 718, the California Supreme Court said that the "ownership of the soil by persons morally bound by the obligations of citizenship is vital to the political existence of a state."

The United States District Court in *Terrace v. Thompson*, 274 Fed. 841, said: "It is within the realm of possibility that every foot of land within the state might pass to aliens.

The Supreme Court of the United States, quoting and affirming the District Court, said:

> "It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power

to effectually work for the welfare of, the state. And so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries."

Terrace v. Thompson, 263 U. S. 220, 68 L. Ed. 275, 277.

The decision in *Porterfield v. Webb*, 263 U. S. 225, 68 L. Ed. 278, rests on the same reasoning.

Other decisions rephrase those statements. *All of the statements mistakenly assume that persons who are not citizens lack loyalty to and an interest in the State. All of them are founded on an error in reasoning, as will be shown.*

Mott v. Cline, supra, speaks of "owners" of the soil. The statute in question is broader. Reasoning which might, hypothetically, support a statute dealing solely with ownership would not necessarily support a statute forbidding even cultivation of the soil. The moral obligations of citizens could scarcely afford grounds for forbidding aliens the privilege of tilling the soil; or for denying to aliens the benefit of the soil after it had been tilled, let us say, by citizens who are morally bound and who, we may assume, have discharged those obligations.

It should be added that the obligations of citizenship which are of sufficient dignity for legislative recognition are enforced by positive law and act with equal force on aliens.

Carlisle v. U. S., 16 Wall. 147, 21 L. Ed. 426.

A class created by legislative fiat has no necessary characteristic other than that on which the class is based—

national origin. But this court has said, "Loyalty is a matter of heart and mind, not of race, creed, or color." (*Ex parte Endo*, 323 U. S. 283, 302, 89 L. Ed. 242.) A class composed of eligible aliens who have refused to become citizens are distinguishable by an attitude of heart and mind. But not a class of ineligible aliens. To deny to an alien the right to become a citizen, and then on *that ground alone* to brand him disloyal or, on *that ground alone*, conclusively to assume that he has an interest adverse to the State is as abhorrent to justice as it is repugnant to reason. Obviously among ineligible aliens are those who have the requisite heart and mind, as well as those who do not.

Thus ineligible aliens do not by that fact alone have any characteristic which requires prohibitory legislation. No matter who they are or where they came from, they are, today, the ancestors of American citizens. They include persons of every stripe, good and bad, Nathan Hales and Benedict Arnolds. The factual basis for a classification is wanting.

Is there a "statistical" basis? Is it true that so large a proportion of ineligible aliens harbor evil thoughts against the State that for facility of administration the legislature may treat them as a class? This is obviously not true. But even if it were true, the State could not deny a civil right to an individual simply because it was more expedient not to recognize exceptions.

Schlesinger v. Wisconsin, 270 U. S. 230, 70 L. Ed. 557;

Weaver v. Palmer, 270 U. S. 402, 70 L. Ed. 654.

In the *Schlesinger* case, *supra*, it was said:

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an enactment forbidden by the Constitution if this seems necessary in order to enable the state readily to collect lawful charges against 'B.' Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity." (70 L. Ed. 564.)

What, then, is the State seeking to protect? The California Supreme Court answered it by quoting from an earlier case:

> "The ownership of the soil by persons morally bound by obligations of citizenship is vital to the political existence of a state."

This statement embodies in its purest form the logical fallacy on which the decisions of the Supreme Court of the United States have been based. For, note, *nothing in the legislation denies to a citizen the right to own land.* Even if it be assumed that the government of a State, its polity would be better if its citizens were landowners, still the legislation could not be sustained, because it does not forbid the ownership of land by citizens. Even if it should be conceded, contrary to what everyone knows to be the facts, that one who is not a citizen and cannot become one lacks an interest in the State, still the legislation is void. That reason is ground for permitting *citizens* to own land; it is no ground for denying to *aliens* the right to own land.

Furthermore, aliens *are* permitted by the statute to own, cultivate, and use land. It is true they must be eligible to citizenship, but they need not have the slightest desire or the remotest intention to become citizens. They may be as disloyal and as wicked as anyone cares to imagine; yet their rights are greater than those of ineligible aliens. What proper purpose could possibly be served by excluding ineligible aliens from privileges accorded to disinterested, even antagonistic aliens? Even if it should be conceded that a prohibition directed at aliens could be sustained, the fact is that such a prohibition was not adopted by California, and it is not here in question. (*California Civil Code*, Sec. 671.)

Does the State believe that aliens owning land will somehow influence for evil the electorate's political decisions? Such a contention assumes the correctness of a classification based on "heart and mind" and is subject to the defects already noted. But in any event, the errors of such an argument are numerous. In the United States it is the citizen who directs the State, and the hypothetical disposition toward evil on the part of aliens cannot find an outlet in the State's polity. No alien is given a voice in directing the government.

And the fact is that it is California's own determination which denies to aliens the right to vote. Nothing in the United States Constitution interferes with the State's power to determine whether or not aliens may vote.

Constitution of the United States, Art. I, Sec. 2;
U. S. v. Wong Kim Ark, 169 U. S. 649, 42 L. Ed. 890;
People v. Scott, 56 Mich. 154, 22 N. W. 274;
Langer v. Balfour, 104 Ark. 466, 149 S. W. 75;
Cf. Van Valkenburg v. Brown, 43 Cal. 43.

Until recently many states allowed all male "residents" or "declarants" to vote, and obviously included aliens. (See cases collected at 20 C. J. 68 and 29 C. J. S. 38.)

What then would such an argument come to? A State denies to aliens the right to vote, and then argues that since they have not the right to vote, they may not own land. Obviously, one discretionary deprivation ought not to be accepted as justification for another.

The evil "within the realm of possibility" that aliens might buy up every foot of the State's land is too absurd to merit the effort required to deny it. The mere fact that an evil is mathematically or physically possible does not afford ground for classification. Constitutional rights cannot be wrested by hypotheses.

Finally, the irrefutable answer to all of the professed grounds of discrimination, the reality which strikes down the imaginary evils, is the history of the States who do not have such legislation. Even after the hysteria bred of war, only ten States deny the right to own land to ineligible and non-declarant aliens. Thirty-eight States have no such classification.* Hawaii, which has more Japanese and other Orientals than any State in the Union, has no such legislation. The States which do not discriminate against aliens in this respect include such prosperous States as New York, Massachusetts, Ohio and Colorado. No observable defection from loyalty marks those States. No lack of interest in the state's welfare is apparent. These States form a well-integrated, respected, and literate part

*In an Appendix we have set forth the current legislation in the several states and Hawaii as to the rights of aliens to own real property and limitations thereon.

of the United States; their people are no less healthy, cultured, and law-abiding than the other of the States. Comparison with California shows no injury by reason of alien land-ownership. Great foreign immigrations have made their homes in many of these States, but there is no evidence that any State or any large area in any State has been brought up by aliens, or if so, that this has injured the State.

In the light of the history of those States, the stated reasons for classification are exposed as the sheerest legal fictions, invented without honest regard for the facts, but solely for the purpose of lending a plausible exterior to prejudice, racism, and unconstitutional legislation.

Alien Escheats Arose Out of a Feudal Society and Are Unfounded Anachronisms Today.*

It is well known that our theories about ownership of land are of feudal origin. Ownership at the common law was, strictly speaking, predicated only of the king. Everybody else merely "held" the land mediately or immediately of the crown. This was different in other parts of Europe where there was such a thing as a real "allod," *i. e.*, land not held by any human sovereign.

In England consequently no one could *"own"* land, *i. e.*, hold it "in fee simple," or "have the freehold," except as a subject of the king. Tenure involved the "bond of allegiance," the *Ligeantia*. A foreigner was not a subject. He had no bond of allegiance. If he was a resident of England, he was only a tolerated sojourner, subject to arbitrary expulsion, and unless he was protected by

*This section of the brief is the work of Dr. Max Radin.

his own sovereign, he could be summarily imprisoned or executed. He had no standing in any court except by petition to the king directly, and that would not avail him against the king.

The collection of allegiance with land-tenure was not quite so definitely established in the early days of the common law, but well before the peak of the Middle Ages it had been settled that an alien could not own land within the king's dominions.

The English law with its feudal implications, almost precisely as it was worked out in Calvin's case concerning the *Antenati* and the *Postnati* just about the beginning of the colonization of North America, became the law of the colonies more or less as a matter of course. It may be remembered that the date of the first colonization, 1607, *i. e.*, the fourth year of James I, is usually taken as the date at which the English common law was received in the United States.

Blackstone, whose commentaries were so widely read in the colonies and in the early history of our courts, makes the categorical statement that "an alien born may purchase lands or other estates but not for his own use, for the king is thereupon entitled to them." (Comm. I 371.) He gives the stereotyped reason for it, that the alien owing allegiance to another king who might later be at war with England, will be involved in "inconveniences."

It is hardly necessary to point out that the entire background is not merely feudal in its terminology but has its roots in the special feudal obligation which arose out of lands held by "Knight's service," much the most common and far the most important of the feudal tenures. This

obligation was that of serving personally and providing other military aid to the lord—usually the king—in war. Since this obligation rose out of the tenure itself, there was an obvious rationalization for the disability of an alien to hold land and the "inconvenience" mentioned by Blackstone was a real one.

But, in any case, except as a matter of feudal organization, the disability had no meaning. It never applied to personality which in a credit-economy soon came to be nearly as important as landed property even in England, and in the United States and most other states, out-ranks landed property.

The rule as to alien's right to hold real property as announced by Blackstone, prevented acquisition of property by process of law, *i. e.*, by succession. The title never devolved on the alien at all. If he bought the land, however, he could pass a good title and would not himself be disturbed in possession except by direct interposition of the king, by an inquisition called "office found." The term "escheat" was not properly applied to it.

All these feudal doctrines and the complications of the *antenati* and the *postnati* remained to plague the courts of the United States in the early decades of the nineteenth century. Kent, in his commentaries (2 Kent's Comm., 14th Ed., 80-90) expounds the intricate law which most of the states were beginning to shed.

Many, but not all of the states, have abolished most of the disabilities of aliens in respect of real property. An old list is contained in 1 Stimson, American Statute Law, §§6010-6015; this brief contains a complete digest. But it is unfortunately the fact that, throughout, the reform has been accomplished only in part and piece-meal.

It is quite true that in many cases aliens have acquired the rights of holding land by virtue of treaties entered into by the United States and their country of origin. In some instances these are special treaties, but sometimes the alien made his claim to be granted full rights of acquisition and user under a "most-favored-nation-clause." Because of these treaties, the disabilities of aliens have not brought into striking relief the absurdity of retaining in our present system, a disqualification predicated upon an organization of society not only wholly obsolete but fundamentally at variance with our economic and political practices and theories.

Nearly all other civilized countries have discarded the feudal background of land ownership. When any disability of aliens has been reintroduced, it is on a different basis. For example, the Republic of Mexico found after the secession of Texas that unlimited rights of aliens to acquire land might lead to the loss of actual territory. Again, in later times, the same country discovered that alien landowners who had powerful governments to back their claims might be in a better position than landowners. For that reason Section 27 of the Mexican Constitution provides, first, that ownership of land is primarily reserved for Mexican citizens, and, second, that aliens may, by general or special permission, acquire lands only on the express condition that if they at any time seek the intervention of their own governments to assert their rights, they forfeit the land to the state.

Even here, it will be observed, all aliens are treated in the same way. And the occasion for excluding aliens to the extent that they are excluded, is not a baseless theory of racism, but a specific protection against a

danger actually experienced before it was deemed necessary to forestall its recurrence.

There would be no objection to the exclusion of aliens from the ownership of land if such a danger existed, especially if cogent evidence of the dangers were available. No one will assert that there is such a danger in California. And it is to be noted that in Mexico, they did not follow the attempt in California and other Western States and discriminate between Americans and other foreigners or between "Anglo-Saxons" and other foreigners, although the real and demonstrable danger in Mexico had come from one source only, to wit, the United States.

The absurdity of maintaining those vestigial and functionless appendices is made even more prominent by the fact that England, from which we have derived them and which kept them long after the rest of Europe had abandoned them, did finally abolish them and did so at one blow, by the Naturalization Act of 1870. Only one exception was made. An alien might not own a British ship, an exception in no sense unreasonable in itself and generally found among the maritime nations of the world.

It is only a corollary of the right to distinguish between an alien's right to enjoy real property and his right to enjoy personal property, that the Alien Land Law, which adds to that discrimination, can be defended at all. It rests on some such statements as that found in Mr. Justice Henshaw's opinion in *Blythe v. Hinckley*, 127 Cal. 431:

> "It is an established rule of law, everywhere recognized, arising from the necessities of the case, that the disposition of immovable property, whether

by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated."

These words are quoted from *U. S. v. Fox*, 94 U. S. 315. Other cases are quoted to the same effect. *Hutchinson Inv. Co. v. Caldwell*, 152 U. S. 65; *Mager v. Griams*, 41 How. 490. But these cases all dealt with the inheritance of property which is a matter of a special sort and in the last case, *Mager v. Griams, supra*, Justice Taney expressly declared that in respect of inheritance there is no distinction to be made between real and personal property.

More important than this last fact is the circumstance that the Fourteenth Amendment was in no sense at issue in the first two cases and was not in existence in the last. It is in regard to that Amendment that the issue arises here.

California, in its first Constitution, 1849, Article I, 17, gave "resident foreigners" the same rights, in respect to the possession, enjoyment and inheritance of property, as native-born citizens. *Cf.*, the edition of 1907, edited by C. F. Curry and published by state authority, p. 93. It is important to note this, because in many editions of the Constitution the original form is not cited, although the text of the 1849 Constitution is frequently referred to. *Cf.*, the many editions by W. F. Henning which are commonly to be found in libraries and which erroneously give the form of 1879 as the original text. (1st Ed. 1895, p. 44.)

The authentic text appears in the supplement to both the English and the Spanish text of the Debates of the Convention, published in 1850, at Washington. (Eng. text, App. p. IV; Span. text, App. p. IV.)

The discussion on this point was brief. One member of the Constitutional Convention, Mr. Larkin (p. 43) moved to substitute "citizen" for "resident." The motion was defeated. A motion to strike out the entire section was defeated by a vote of 25 to 11; substantially more than 2 to 1.

This was not because the Californians of 1849 had no race prejudices. They definitely did, as the discussions set forth in the Debates, pp. 68-70, show. Many did not intend to allow "full-blooded Indians" or "Africans" to vote. But it never occurred even to those who meant to prevent their voting to deprive them of their property or their right to own property. (*ibid.*, p. 69.) They did not quite descend to that level.

It was not until the Constitution of 1879 that the term "foreigners" was qualified by the addition of the words "of the white race, or of African descent, eligible to become citizens of the United States under the naturalization laws thereof." It is this form which is found in our present Constitution, I, 17.

It is obvious that this section of the Constitution, even assuming its constitutionality under the Fourteenth Amendment, which is specifically challenger in this case—could not justify the Alien Land Law. If the words mean anything they would also limit the right to have *personal* property to native-born citizens, white foreigners and persons of African descent. And on its face it would be contrary to the Constitution of the United States, since the right to possess personal property, as can be seen at once, is absolutely essential for living at all under modern conditions.

Evidently this is also the opinion of the Supreme Court of the United States. In the case of *Terrace v. Thompson*, which is the foundation of all the cases in California which have passed in the power to restrict the ownership of land to certain classes of aliens, the Court declared (263 U. S. 197, 216-217):

> "The Fourteenth Amendment, as against the arbitrary and capricious or unjustly discriminatory action of the State, protects the owners in their right to lease and dispose of the land for lawful purposes and the alien resident in his right to earn a living by following ordinary occupations of the community."

The Court, to be sure, goes on to say (*ibid.*, p. 221):

> "It is not an opportunity to earn a living in common occupations of the community, but it is the privilege of owning or controlling agricultural land within the State. The quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest import and affect the safety and power of the State itself."

This case and the case of *Webb v. O'Brien*, 263 U. S. 313; were decided in the same term, by the same Court, Mr. Justice Butler writing the opinion in both cases. No one of the members of the Court then is now a member of that high tribunal.

It will be seen that even those cases which go as far in these matters as any court has ever gone, will not on analysis support the contention that an exclusion of certain aliens, based on race, is admissible.

The case is based on the common law disability of all aliens. (*Ibid.* p. 217.) As so based, says the Court, the State law is valid:

> "State legislation applying alike and equally to all aliens, withholding from them the right to own land, cannot be said to be capricious or to amount to an arbitrary deprivation of liberty or property, or to transgress the due process clause."

The second basis is that of allegiance. *Bona fide* declarants are permitted to own land. This the Court says in the passage already cited obviates the difficulty that ownership of land might be combined with foreign allegiance. The Court here harks back to the *ligemantum fidei* of feudal times. It may be said at once that there is no basis in fact, and none has been offered, for the doctrine that under modern conditions, which we trust are very different from feudalism, foreign allegiance is any more harmful if the foreigner owns land, than if he owns a controlling share in some great industrial or utility company. We may, therefore, assert with all due respect, that the Court, in 1923, did not sufficiently consider the purely traditional and unrealistic character of the doctrine they invoked.

But even if, for the purposes of argument we did accept this doctrine, it would still not support the California Alien Land Law. (California General Laws, pp. 129, *et seq.*, Alien Property Initiative Act of 1920.) The Supreme Court declared that a discrimination was constitutional between aliens and citizens, and between declarant aliens and other aliens. The discrimination was based on the fact of allegiance. But the California Act discriminates between aliens "eligible to citizenship" and other aliens. It therefore violates the one basis on which

even so extreme a case as *Terrace v. Thompson* is put. It leaves in control and possession of land a great many aliens who have never declared their intention to be in the allegiance of the United States, including many who hold allegiance to countries recently at war against the United States, and a great many who have so long been residents without becoming declarants, that we may infer a settled purpose never to become citizens of the United States.

It was the custom of the California cases which have passed on the constitutionality of the Alien Land Law to rely on *Terrace v. Thompson*, or *Webb v. O'Brien*, and not to analyze the situation further. *Cf. Motl v. Cline*, 200 Cal. 434, 444, *et seq.*, *Porterfield v. Webb*, 195 Cal. 71, 83, *et seq.* Since the cases in the Supreme Court are based on a wholly different ground from that found in the California law, it is respectfully submitted that the California cases were without foundation so far as the Federal Constitution is concerned.

We may venture to assert that the cases in California and elsewhere permitting discrimination against "aliens ineligible to citizenship" were decided at a time and in a general background wholly different from that of the present day. It was admitted at the time that however covered by the reference to citizenship and allegiance, the real basis was race. That is admitted in *Porterfield v. Webb*, 195 Cal. 71, 82, were the Court says:

> "Racial distinctions may furnish legitimate grounds for classifications, under some conditions of social or governmental necessities."

The Court quotes the case of *Piper v. Pine Hill Dist.*, 193 Cal. 664, where some similar, very general statement

is made, although in that case the Court *refused* to make a racial distinction. But at all events, if the feeling and temper and conventional attitude of people were legitimately considered in 1923 or before, it must be evident that the change in American attitude generally on that subject must be considered.

We have had such drastic and dreadful evidence of what the results of racial discrimination are, we have so firmly bound ourselves by the Charter of the United Nations, to permit no discrimination by race, that these insufficiently considered phrases in the older cases should be by this Court formally and decisively rejected.

No one will seriously pretend that whatever may be the terms by which it is covered, the discrimination against Japanese here challenged is based on anything but race. The vast majority of the Japanese immigrants ineligible to citizenship have shown through grievous and unmerited sufferings their desire to remain here and their attachment to the United States. The few who have evinced a different feeling have been deported or are in process of deportation. It is certainly as legitimate for the Court to take into account the present far more scientific attitude to the problem of "race," as it is to consider the popular and prejudiced attitude of the past generation.

Just as Article I, Section 17, the Constitution of the State, does not justify the restriction of the right of owning real property to aliens eligible to citizenship, *i. e.*, white and persons of African descent, so Article XIX can certainly not be used for that purpose. This article in several sections has been declared to be in violation of the Constitution of the United States. (*Cf. State v. S. S. Constitution*, 42 Cal. 578; *In re Parott*, 6 Sawy. 349, 1

Fed. 481.) The entire Article was of course originally enacted against the Chinese who by recent Federal statutes have been removed from the class of persons ineligible to citizenship. But the animating purpose is the same as that which governs the Alien Land Law and should be equally disavowed.

Conclusion.

The legislative preference for means to avoid an evil is not unlimited where fundamental rights are at stake. Legislation aimed at specific abuses (assuming any could be shown) could accomplish everything the state has a right to do without discriminating against persons. A legislative preference to accomplish a justified purpose by discriminating against persons could not sustain the legislation, because of the nature of the right involved.

Only a willing suspension of critical faculties could accept the professed grounds for the classification. The asserted lack of interest, the threat of alien monopoly of land, the danger that the soil will be abused are no more than the inventions of legal minds hard pressed to conceal the realities, the *"race undesirability,"* and the evidences of sheer prejudice which surround the legislation, and which even now expose the utterances of some of its most passionate defenders.

The philosophy of the Fourteenth Amendment, not to say the history of the last decade, preaches a more cogent sermon than those racist generalizations. Our courts have said that legislation which discriminates against persons because of race is immediately suspect, and is not supported by the ordinary presumptions of validity, but must justify itself beyond dispute.

It has been shown that if the doctrine has roots in anything other than racial antagonisms, the historical basis has long since been abandoned. What suits a feudal society can hardly be justified in the middle of the twentieth century.

The times have brought question such as those underlying this case into focus. Many decisions of the 'twenties, political, economic, racial, and judicial, have since been re-examined, rejected, and left far behind. The course of America's and the world's history since the 'twenties has been marked by a sharp reconsideration of tenets which twenty-five years ago we thought immutable.

The decision in this case, whatever it is, will be a landmark. The courts of this generation must either pierce the veil of assumptions and false legalisms with which anti-race laws have been surrounded, or by acquiescence they will perpetuate that folklore. Our future will forever receive the impress of that decision.

We respectfully submit this Court should grant certiorari and on decision reject the formal, the unreal, and, in some few cases, the consciously dishonest excuses for violating the fundamental notion of equality under the law which is Americanism, and embodied in the Fourteenth Amendment. The Alien Land Laws must be held unconstitutional and the judgment appealed from reversed.

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APPENDIX.

Alien Land Laws of the Several States and Hawaii.

ALABAMA:

Constitution, Sec. 34;

Code of 1940, Title 47, Chapter 1.

An alien may take, hold, dispose of and transmit real and personal property to the same extent as a native citizen.

ARIZONA:

Arizona Code, Annotated (1939), Chapter 71, Section 201.

Similar to California.

ARKANSAS:

Arkansas Statutes 1943, Act 47.

"An act to safeguard the real property of the State of Arkansas and the Citizens thereof and for other purposes because on account [*sic*] of the standards of living of the Japanese people, a white person cannot profitably compete with the Japanese either in agriculture or business; now therefore be it enacted

No Japanese shall ever hold title to any lands . . ."

COLORADO:

Colorado Statutes, Annotated (1935), Chapter 7, Section 6.

All aliens may inherit, purchase, hold, enjoy, alienate and transmit property real and personal the same as citizens.

CONNETICUT:

General Statutes, Revision of 1930.

Sec. 5055. Resident aliens and citizens of France, if treaty so provides, have same rights as to real property as citizens.

Sec. 5056 provides for some limitations on non-resident aliens.

DELAWARE:

Revised Code of 1935.

Sec. 3655 provides that real and personal property situated in this state may be held by aliens in the same manner as by citizens.

FLORIDA:

No express statute, but Section 731.28, Florida Statutes, declares that there is no difference between aliens and citizens as far as inheriting land is concerned.

GEORGIA:

Code of Georgia, Annotated, Title 79, Section 303.

Provides that all aliens, except alien enemies, may own land.

HAWAII:

Revised Laws of Hawaii (1945), Section 4556.

All aliens may purchase land through private persons but may not acquire public land under homestead laws, unless they have declared intention to become citizens.

IDAHO:

Idaho Code, Annotated (1932), Title 23, Section 101.

Provides that aliens not eligible to citizenship may only acquire land to extent of treaties between their country and the United States but Title 14, Section 115, permits resident aliens to inherit land.

ILLINOIS:

Smith-Hurd Illinois Annot. Statutes, Chapter 6, Sections 1, 2, 3.

Aliens may hold land for 6 years. Thereafter, if alien not naturalized, it escheats.

INDIANA:

Burns' Indiana Statutes, Title 56, Sections 501, 504, 505.

Aliens, resident or non-resident, can hold land as much as 320 acres for five years.

IOWA:

Code of 1939, Section 10214.

Resident aliens can own land without restriction. Certain restrictions on non-resident aliens.

KANSAS:

General Statutes of Kansas (1935), 1943 Supplement, Chapter 59, Sections 511, 512; Chapter 67, Section 701.

Similar to California.

KENTUCKY:

Kentucky Revised Statutes (1944), Section 381.280

Declarant aliens may own land.

LOUISIANA:

No restrictions against aliens owning land. No express statutes.

MAINE:

Revised Statutes of 1944, Chapter 154, Section 2.

Aliens may take, hold, convey and devise real estate in the same manner as citizens.

MARYLAND:

Flack's Annotated Code of Maryland (1939), Article 3, Section 1.

Aliens, other than enemy aliens, may own land.

MASSACHUSETTS:

Annotated Laws of Massachusetts, Chapter 184, Section 1.

Aliens may own land.

MICHIGAN:

Constitution (1908), Article 16, Section 9.

Resident aliens have same rights at citizens, except as to franchise.

MINNESOTA:

Session Laws (1945), Chapter 280.

Aliens can own land up to 90,000 square feet except by devise, inheritance, or as security for indebtedness in which case there is no limitation as to amount. No limitation if alien has declared his intention to become a citizen.

MISSISSIPPI:

Mississippi Code of 1942, Section 842.

Resident aliens may own land; non-residents subject to some limitations.

MISSOURI:

Revised Statutes of Missouri (1939), Sections 15228 to 15230.

Aliens who have not declared their intention to become citizens may only acquire land by devise or descent or in collection of debts unless such right is secured by existing treaty.

MONTANA:

Revised Codes of Montana (1935), Sections 6802.1-6802.4.

Aliens not eligible to citizenship cannot take title to land except mines and mining property. Such alien may, however, acquire land in good faith under mortgage foreclosure or in ordinary course of justice in collection of debts, and hold it for not over 12 years.

NEBRASKA:

Revised Statutes of Nebraska (1943), Chapter 76, Sections 411, 403, 405.

Aliens may not hold title to real estate outside of corporate limits of cities and towns except in satisfaction of a lien in which case it must be sold within ten years after title is obtained. Resident aliens may hold any property acquired by devise or descent for five years.

NEVADA:

Nevada Compiled Laws of 1929, Section 6365.

No difference between resident aliens and citizens. Non-resident aliens except Chinese can acquire real property by purchase. Non-resident aliens cannot inherit property or take under a will unless country where alien resides or of which he is a citizen accords such rights to citizens of United States.

NEW HAMPSHIRE:

Revised Laws of New Hampshire (1942), Chapter 259, Section 19.

No distinctions between resident aliens and citizens.

NEW JERSEY:

Revised Statutes of New Jersey, Cumulative Supplement, Title 46, Chapter 3, Section 18 (1943 Act).

Resident aliens permitted or licensed by government to remain in and engage in business in United States who have not been arrested or interned may acquire, hold, and convey land as if native-born citizens.

NEW MEXICO:

Constitution, Article 2, Section 22.

Similar to California.

NEW YORK:

McKinney's Consolidated Laws of New York, Annotated, Title 49, Article 2, Section 10.

No distinction between aliens and citizens.

NORTH CAROLINA:

General Statutes of North Carolina (1943), Chapter 64, Section 1.

No distinction.

NORTH DAKOTA:

Revised Code of 1943, Chapter 47, Section 0111.

No distinctions.

OHIO:

Page's Ohio General Code, Sections 10503-10513.

No distinction.

OKLAHOMA:

Oklahoma Statutes Annotated, Title 60, Section 121;

Constitution, Article 22, Section 1.

Resident aliens can hold title; land must be disposed of five years after he ceases to be *bona fide* resident.

OREGON:

Oregon Compiled Laws, Annotated (1940), Title 61, Section 101;

Session Laws of 1945, Chapter 436.

Similar to California.

PENNSLYVANIA:

Purdon's Pennsylvania Statutes Annotated, Title 68, Section 25.

Aliens, other than enemy aliens, may hold real estate but not more than 5,000 acres nor to exceed a net income of $20,000 a year.

RHODE ISLAND:

General Laws of 1938, Chapter 432, Section 1.

No distinction.

SOUTH CAROLINA:

Constitution of 1895, Section 35, Article 3.

Duty of Assembly to enact law limiting number of acres which any alien may own.

Code of 1942, Section 7790.

Aliens may hold property as citizens up to 500 acres of land.

SOUTH DAKOTA:

Constitution, Article VI, Section 14.

Constitution provides that no distinction shall ever be made by law between resident aliens and citizens is reference to possession, enjoyment or descent of property.

TENNESSEE:

Williams Tennessee Code, Annotated, 1934, Section 7187.

No distinction.

TEXAS:

Vernon's Annotated Texas Statutes (Civil Statutes), Title 5, Sections 167-172.

Aliens may acquire and hold lands in any incorporated or plated city, town or village without restriction.

Title to or leasehold or other interest in any other land in state may not be acquired or held by aliens except those who:

1. Were *bona fide* residents of state on June 12, 1921.
2. Are eligible to citizenship, are inhabitants of the state and have declared their intention of becoming United States citizens.
3. Are natural born citizens of nation having common land boundary with United States.
4. Are citizens or subjects of nation which permitted United States citizens to own land.

Aliens may acquire and hold lands in collection of debts and by devise or descent but only for 5 years.

UTAH:

Utah Code Annotated, 1943, 1945 Cumulative Pocket Supplement, Title 78, Chapter 6a (enacted in 1943).

Similar to California.

VERMONT:

No statute on the subject. *State v. Boston etc. R. R. Co.*, 25 Vt. 433, held that aliens not enemies may acquire real or personal property the same as citizens.

VIRGINIA:

Virginia Code of 1942, section 66.

No distinction, except as to enemy aliens.

WASHINGTON:

Remington's Revised Statutes, Section 10581.

Aliens, other than those who have in good faith declared intention to become United States citizens, may not own land except if acquired under mortgage foreclosure and in that case for sixteen years. Aliens may also hold land for ten years for a purpose for which an alien is accorded the use of land by a treaty between United States and the country whereof he is a citizen.

WEST VIRGINIA:

Michie's West Virginia Code of 1943, Annotated, Chapter 36, Article 1, Section 21.

No distinction.

WISCONSIN:

Wisconsin Statutes, 1943, Chapter 234, Section 22.

No distinction between citizens and resident aliens. Some limitation on amount of land that may be owned by non-residents.

WYOMING:

Session Laws of Wyoming, 1943, Chapter 35.

Aliens not eligible to citizenship (except Chinese) may not acquire, possess, enjoy, use, lease, transfer, transmit or inherit real property or any interest therein or have in whole or in part, the beneficial use thereof.